FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

LITTLE RIVER-STRATHMORE IRRIGATION DISTRICT, *Appellant*,

v.

No. 772

MILO W. BARNES AND ELLEN J. BARNES, AS EXECUTORS APPOINTED BY THE WILL OF MARTIN BARNES, DECEASED, ET AL., *Appellees*.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AS AMICI CURIAE IN SUPPORT OF APPELLANT

JACK HOLT,
Attorney General of Arkansas.

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Attorney for Drainage District No. 7 of Poinsett County, and Cache River Drainage District of Craighead, Jackson and Lawrence Counties, Arkansas.

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LINDSAY-STRATHMORE IRRIGATION DISTRICT.....*Appellant*,

v. No. 772

MILO W. BEKINS AND REED J. BEKINS, AS TRUSTEES APPOINTED BY THE WILL OF MARTIN BEKINS, DECEASED, ET AL. .....*Appellees*.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AS AMICI CURIAE IN SUPPORT OF APPELLANT

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

May It Please the Court:

The undersigned, Jack Holt, Attorney General of the State of Arkansas, and Chas. D. Frierson, as attorney for several drainage districts, respectfully move this Honorable Court for leave to file the accompanying brief in this cause as *amici curiae*.

Jack Holt

JACK HOLT,

Attorney General of Arkansas.

Chas. D. Frierson

CHAS. D. FRIERSON,

Attorney for Drainage District No. 7 of Poinsett County and Cache River Drainage District of Craighead, Jackson and Lawrence Counties, Arkansas.

BRIEF OF ATTORNEY GENERAL OF ARKANSAS AND CHAS. D. FRIERSON, ATTORNEY FOR CERTAIN DRAINAGE DISTRICTS, AS AMICI CURIAE IN SUPPORT OF APPELLANT

I.

PRELIMINARY STATEMENT

The State of Arkansas has a deep interest in this controversy because a vast area of its richest land has been reclaimed by drainage and levee districts. Said districts have issued millions of dollars in bonds and, owing to the depression and also to floods and levee breaks, the lands have not been able to produce crops of sufficient money value to pay the tax burdens and many of the bond issues were hopelessly in default. Consequently the landowners also ceased to pay State and county taxes and the State lost much revenue and acquired title to a great deal of forfeited land.

Congress provided that Reconstruction Finance Corporation might lend money to these districts to refinance their debts. Such refinancing proved highly beneficial to bondholders as well as to taxpayers and in nearly every case the vast majority of bondholders were willing to accept the composition offered. However, in practically every district a small minority refuses the offer and demands full payment of the original debt and interest. In nearly every large issue also some of the bonds are unavailable for settlement because they are hampered by trust agreements and in many instances blocks of the original bonds cannot be located. Thus in many cases there is litigation after the

first disbursement of Reconstruction Finance Corporation loan and there appears to be no possibility of finally winding up the refinancing program unless some such plan as the debt composition act in question can be established.

Drainage District No. 7 of Poinsett County and Cache River Drainage District of Craighead, Jackson and Lawrence Counties, Arkansas, were both hopelessly insolvent; both were offered loans by the Reconstruction Finance Corporation. Both made a complete compromise with a large majority of their creditors and as to each of them a minority is seeking full payment of individual claims. In each case some few bonds cannot be found or are prevented from taking any part because of trust agreements or the like. Both districts have filed proceedings under the debt composition act and both therefore will be affected by the determination of this appeal. Many other districts are affected in a similar manner.

We contend that the new debt composition act, U S C A Title 11, Chapter 10, Sections 401 to 404, inclusive, is constitutional and is an act on the subject of bankruptcies within the powers of Congress.

II.

ARGUMENT

The Act of Congress for the composition of indebtedness of local taxing agencies, being amendment to the Bankruptcy Act, U S C A Title 11, Chapter 10, Sections 401 to 404, inclusive, is a valid and uniform act on the subject of bankruptcies, does not invade the reserved powers of the States and is constitutional for the following reasons:

POINT A

A TAXING AGENCY, SUCH AS A DRAINAGE DISTRICT OR OTHER IMPROVEMENT DISTRICT IN ARKANSAS AND MANY OTHER STATES, IS NOT A POLITICAL SUBDIVISION NOR AN ARM OF THE STATE FOR ANY GOVERNMENTAL PURPOSE, BUT IS AN AGENCY OF THE TAXPAYERS

In Arkansas and many other States a drainage, levee or other special improvement district is definitely NOT an arm of the State for any general governmental purpose. It is only a public quasi-corporation given for very limited purposes the power to collect special assessments based on benefits to real estate within a limited area and the power of eminent domain within the same limits. Its governing board is an agency for its taxpayers. It may sue and be sued just the same as private corporations (except for a partial Immunity from tort actions). It may compromise and adjust claims as an incident to its right to litigate.

Hence we respectfully contend that the debt composition act does not invade State sovereignty nor interfere with any reserved powers of the State.

"Hence it will be seen that, if the proposed acts of Drainage District No. 7 of Poinsett County were to be committed by a railroad corporation, by a private corporation, or by a private person, the venue of the action would be in Cross County, where the land is situated and service would be had upon the defendant in Poinsett County, where the act sought to be enjoined was alleged to be committed. But it is insisted that this rule does not apply to a drainage district. We do not agree with counsel in this contention. It is true that drainage districts, levee districts, and road improvement districts are created by statute, and have only such powers as are expressly or impliedly conferred upon them. They are quasi-public corporations with power to sue and be sued with reference to the matters conferred upon them. *Altheimer* v. *Board of Directors of Plum Bayou Levee District*, 79 Ark. 229, 95 S. W. 140; *Board of Directors of St. Francis Levee District* v. *Fleming*, 93 Ark. 490, 125 S. W. 132; and *Board of Levee Inspectors of Chicot County* v. *Southwestern Land & Timber Company*, 112 Ark. 467, 166 S. W. 589. According to these and numerous other decisions of this court, local improvement districts and their commissioners are governmental agencies created as quasi-public corporations deriving their powers directly from the Legislature and exercising them as the agent of the property owners in the district whose interests are affected by the duties they perform. They exercise no governmental powers except those expressly or impliedly granted by the Legislature. They are not political or civil divisions of the State like counties and municipal corporations created to aid in the general administration of the government. They are not created for political purposes or for the administration

of civil government. Hence no public policy would be violated by applying the same rules for the service of process upon them as are prescribed for private corporations and quasi-public corporations, such as railroads, etc."

Drainage District 7 v. *Hutchins*, 184 Ark. 520 (42 S. W. 2d 996).

Following the above case and others the United States Circuit Court of Appeals for the Eighth Circuit held a drainage district does not partake of the State's immunity to suit and is subject to equity jurisdiction and is not a governmental agency.

Drainage District No. 2 v. *Mercantile Commerce Co.*, 69 F. (2d) 138.

In Arkansas a judgment creditor may even levy an execution upon lands forfeited to a drainage district under foreclosure proceedings for delinquent assessments.

Keith v. *D. D. 7*, 183 Ark. 786 (38 S. W. 2d 755).

POINT B

DRAINAGE AND OTHER IMPROVEMENT DISTRICTS, AND EVEN COUNTIES AND SCHOOL DISTRICTS, HAVE BEEN SUED IN FEDERAL COURTS IN MANY INSTANCES AND HENCE IT IS CERTAIN THAT THEY DO NOT PARTAKE OF THE STATE'S IMMUNITY TO SUIT

So well established is this jurisdiction that in one of the early cases Mr. Justice Brewer said:

"It may be observed that the records of this court for the last thirty years are full of suits against coun-

ties, and it would seem as though by general consent the jurisdiction of the Federal courts in such suits had become established. But, irrespective of this general acquiescence the jurisdiction of the circuit courts is beyond question. The Eleventh Amendment limits the jurisdiction only as to suits against a State."

Lincoln County v. *Luning*, 133 U. S. 529 (33 L. Ed. 766).

The following are merely a few of the cases against taxing districts decided in this court:

County of Mercer v. *Hackett*, 1 Wall 83 (17 L. Ed. 548).

Com'rs Knox County v. *Aspinwall*, 21 How. 539 (16 L. Ed. 208).

Hopkins v. *Clemson College*, 221 U. S. 636 (55 L. Ed. 890).

Guardian Sav. & Trust Co. v. *Road Imp. Dist. 7*, 267 U. S. 1 (69 L. Ed. 487).

Commissioners v. *St. Louis S. W. Ry.*, 257 U. S. 547 (66 L. Ed. 364).

Mercantile Trust v. *Wilmot Road Dist.*, 275 U. S. 117 (72 L. Ed. 192).

Graham v. *Folsom*, 200 U. S. 248 (50 L. Ed. 464).

Folsom v. *Township Ninety-six*, 159 U. S. 611 (40 L. Ed. 278).

Particularly we call attention to the cases of Guardian Savings Company against the Road District, and Mercantile Trust Company against Wilmot Road District, *supra*, both of which affect Arkansas improvement districts and in one the appointment of a receiver was sustained and in the other fees for the trustee and his attorney were sustained.

As a defense in the receivership case it was contended that a receiver could not be appointed to collect taxes or special assessments and as a defense in the case concerning fees it was contended that the special assessments were levied for a public purpose limited by the statute and could not be diverted to pay costs; yet in each case the district was treated practically as if it were a railroad or other corporation charged with a public interest and complete jurisdiction was assumed over its affairs.

The right to appoint a third person as receiver was repealed by an act of 1933 in Arkansas, but the courts hold that the commissioners themselves may be constituted receivers and perform like duties.

Drainage Dist. v. *Mercantile-Commerce,* (CCA 8) 69 F. (2d) 138, *supra.*

POINT C

SINCE SUCH ADVERSE SUITS AS ABOVE CITED DO NOT CONSTITUTE AN INVASION OF STATE SOVEREIGNTY, NOR AN INTERFERENCE WITH THE RESERVED POWERS OF THE STATE, CERTAINLY A VOLUNTARY FRIENDLY COMPOSITION WITH CREDITORS CANNOT INVADE STATE SOVEREIGNTY

In the case of *Ashton* v. *Cameron County Water District,* 298 U. S. 513 (80 L. Ed. 1309), the majority opinion relies largely upon authorities concerning taxes by States on Federal agencies or the reverse. The foregoing authorities seem to us much more nearly in point as precedents in the present appeal.

The Federal Courts do not hesitate to invade the affairs of a school or drainage district and even of a county and to levy and collect a tax or a special assessment, and even to appoint a receiver when the State law permits, and all these remedies are granted in adversary litigation and against the State's express objection and that of its subordinate agencies and officers. The courts hold that these agencies have a right to contract and to sue and be sued and therefore may be compelled to carry out their contracts and pay their debts even though to a limited extent they are State agencies.

In Arkansas, as pointed out above, special improvement districts are agencies of taxpayers rather than of the State; but the authorities uphold such suits even against counties which clearly are much more political in their character than are improvement districts.

The debt composition proceeding, even if applied to a purely political subdivision, is not really an invasion nor interference with the affairs of a State because in the most explicit terms it is made to depend solely upon the voluntary action of the taxing district and the language of this court as quoted below applies very directly to the present situation.

> "What, then, is the nature of the right of the State here asserted, and how is it affected by this statute? Reduced to its simplest terms, it is alleged that the statute constitutes an attempt to legislate outside the powers granted to Congress by the Constitution and within the field of local powers exclusively reserved to the States. Nothing is added to the force or effect of this assertion by the further incidental allegations that the ulterior purpose of Congress thereby was to induce the

States to yield a portion of their sovereign rights; that the burden of the appropriations falls unequally upon the several States; and that there is imposed upon the States an illegal and unconstitutional option either to yield to the Federal Government a part of their reserved rights, or lose their share of the moneys appropriated. But what burden is imposed upon the State, unequally or otherwise? Certainly there is none, unless it be the burden of taxation, and that falls upon their inhabitants, who are within the taxing power of Congress as well as that of the States where they reside. Nor does the statute require the States to do or to yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding.

"In the last analysis, the complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent; and it is plain that that question as it is thus presented is political, and not judicial, in character, and therefore is not a matter which admits of the exercise of the judicial power." (pp. 482, 483.)

Massachusetts v. *Mellon*, 262 U. S. 447 (67 L. Ed. 1078).

The same thought is expressed in the dissenting opinion delivered by Mr. Justice Cardozo in the case of *Ashton* v. *Cameron County District, supra.*

In the new act Congress has made it definite beyond all doubt that the proceeding must be purely voluntary, must be based upon the existence of legal capacity of the taxing agency to carry out the composition, and no order

shall be rendered which will interfere with the State's control of its own governmental agencies.

> "Nothing contained in this chapter shall be construed to limit or impair the power of any State to control, by legislation or otherwise, any municipality or any political subdivision of or in such State in the exercise of its political or governmental powers including expenditures therefor."
>
> U S C A Title 11, Sec. 403 (i).

The Court shall not "interfere with (a) any of the political or governmental powers of the petitioner or (b) any of the property or revenues of the petitioner necessary for essential governmental purposes or (c) any income-producing property unless the plan of composition so provides."

Ib. Sec. 403 (c).

POINT D

CONGRESS AFTER FULL HEARING, PASSED THE PRESENT ACT IN A SINCERE ATTEMPT TO REMEDY THE DEFECTS FOUND BY THE MAJORITY OF THE COURT IN THE FORMER ACT AND WE CONTEND THAT THE EFFORT WAS SUCCESSFUL AND THE NEW ACT VALID

Following the decision in *Ashton* v. *Cameron County Water District, supra*, full hearings were had before the sub-committee of the House and a number of different drafts of legislation for the relief of taxing districts were carefully considered and as a result the present act under consideration in this case was drawn and passed in a frank

attempt to cure the objections raised by a majority of the Court to the former act.

The previous act (U S C A Title 11, Sections 301-303, inclusive) was plainly directed to the "readjustment" of debts by "local governmental units," or "political subdivisions of any State."

Throughout the previous act the word "readjustment" or "plan of readjustment" are used, and it is evident that said act was based largely upon the analogy of the act providing for the reorganization of corporations. In the corporate reorganization act the word "reorganization" is used throughout. In the new act the simpler word "debt composition" is used throughout.

It is evident from the hearings upon H. R. 2505, 2506, 5403 and 5969 before the sub-committee of the House on March 1, 10, 17 of 1937, that this distinction was very carefully made. It was thought that the word "readjustment" or the word "reorganization" might imply that Congress was attempting to change in some manner the organization or powers of the taxing districts of the States. The intention was to emphasize the voluntary character of the new proceedings provided for in the present act.

> **"A composition is an agreement made upon a sufficient consideration, between an insolvent or embarrassed debtor and his creditors, whereby the latter for the sake of immediate payment, agree to accept a dividend less than the whole amount of their claims, to be distributed pro rata in discharge and satisfaction of the whole,"**
>
> **Black's Law. Dict., 2 Ed., p. 234.**

By a composition, therefore, there is not involved any idea of a change in the organization or the functions of the debtor but simply a cash payment in full, to be distributed equally among all creditors of like class.

Another very important distinction emphasized in the hearings is that references to "political subdivisions" or "governmental agencies" are entirely eliminated and no mention is made in the new act of "counties" or "parishes," because the committee thought they were more nearly charged with governmental duties than the other kinds of taxing agencies. In the new act there is contained a specific declaration that its subject-matter is within the scope of the bankruptcy laws or, in other words, within "the subject of bankruptcies." The new act stresses in every possible way the voluntary nature of the proceeding, provides that the consent of a majority of not less than 51 percentum in value of the securities shall accept the plan in advance in writing and 66 2/3 percentum shall be required finally to establish the plan. Under the previous act held unconstitutional it was only required that creditors owning 30 percentum of the debts should express their consent at the time the petition was filed. The hearings show that this distinction between the number of creditors assenting was inserted for the specific purpose of showing the court in advance that a majority of the creditors favored the composition.

The force of the language in the former act concerning "political subdivisions" was very fully discussed at the hearings and the committee apparently thought that the use of those words and of the words "governmental

agency" were largely responsible for the conclusion of the majority in the Ashton case that there was an invasion of State sovereignty. All such language was carefully omitted from the present act; the powers of the States were reserved and excepted in the act and it was provided that the court must find that the particular taxing agency involved possessed legal authority from the State to carry out the terms of the composition, without interfering with the State's control over its own agencies, financially and otherwise.

In fact the same program was followed by Congress in regard to the law now under consideration that was discussed by this court in the case of *Wright* v. *Mountain Trust Co.*, 300 U. S. 440 (81 L. Ed. 737).

In that case hearings were had by Congress in an attempt to re-establish relief for insolvent farmers of a type somewhat similar to the original Frazier-Lemke Act which was held unconstitutional in the case of *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555 (79 L. Ed. 1593). In the Wright case, construing the new act, the court gave considerable weight to the intention of Congress as expressed in the hearings and debates and seems to have construed the new act somewhat liberally to uphold its constitutionality.

Congress has definitely expressed an intention to provide for relief to taxing agencies and when the first act was declared unconstitutional hearings were had and a new act has been drawn with the deliberate intention of curing the unconstitutional features which the majority held were inherent in the former act.

We earnestly contend that the new act should be upheld pursuant to the precedent of the Wright case.

POINT E.

THE ACT CONTAINS A BROAD CLAUSE SEEKING TO MAKE IT EFFECTIVE IN ALL STATES AND AS TO ALL TAXING AGENCIES TO WHICH IT MAY CONSTITUTIONALLY APPLY, EVEN THOUGH THE COURT SHOULD HOLD THAT IN SOME STATES AND AS TO SOME AGENCIES IT IS NOT VALID

We contend that the new act should be upheld as applicable to all taxing agencies whether they be political subdivisions or not. But if the court should adhere to the decision in the Ashton case and hold that some districts or agencies, cities or towns constitute arms of the State for governmental purposes, so that the act cannot apply to them; nevertheless, we urge that the court should limit its decision so as to save such agencies in other States or such other agencies as may be affected without violating the Constitution.

Up to date there are two decisions of District Courts on the act published in advance sheets of the Federal Supplement. Of these the case on appeal held the new act unconstitutional because of the precedent in the Ashton case, the court holding that a California irrigation district is "a State agency for purely governmental functions."

21 F. Supp. Adv. Sheets, published Jan. 3, 1938.

On the contrary the District Court for the Eastern District of Arkansas held that an Arkansas drainage district

is not an arm of the State and does not exercise political or governmental functions but is an agency of taxpayers for specific limited duties and that the new act is constitutional and valid as applied to such an Arkansas district.

In re: Drainage Dist. 7, Poinsett County, 21 F. Supp., published Feb. 28, 1938.

The opinion of District Judge Trimble so completely covers the situation with reference to Arkansas districts that no comment upon it is required and furthermore it points out some of the distinctions between the act discussed in the Ashton case and the present act and the effect of the congressional hearings upon the interpretation of the new act. The saving clause wherein Congress undertook to provide that the act might apply to some States or taxing agencies, even though not applicable to other States or taxing agencies, was discussed and he cited to the effect that such a saving clause is a valuable aid to interpretation of the case of *Dorchy* v. *Kansas*, 264 U. S. 286 (68 L. Ed. 686).

POINT F

THE ACT UNDOUBTEDLY IS UNIFORM AND IS AN ACT WITHIN THE SUBJECT OF BANKRUPTCIES

We do not need to multiply authorities upon this question because even the majority opinion in the Ashton case, *supra*, seems to hold that the original act is an act upon the subject of bankruptcy and that it is uniform and the dissenting opinion of Mr. Justice Cardozo clearly points out the authorities which show that the act is uniform to all such agencies as have the requisite capacity under the law

of the place of their creation and that it is an act on the subject of bankruptcies.

Continental Ill. Bank v. *C., R. I. & P. R. R. Co.*, 294 U. S. 648 (79 L. Ed. 1110).

Hanover National Bank v. *Moyses*, 186 U. S. 181 (46 L. Ed. 1113).

IN CONCLUSION we respectfully urge that the debt composition act be held constitutional, or if the court should determine it not to be applicable to the appellant, at least it should be upheld as to any State or any taxing agency that under the law of a particular State may come within its terms.

Respectfully submitted,

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A copy of this brief has been served upon opposing counsel.

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